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LICENSES BY CITIES AND TOWNS TO USE STREETS.

The rapid growth in number and population of our urban communities, due in large part to the marked tendency of the people of this country, of late years, to abandon rural for town and city life, gives a constantly increasing interest and importance to questions in the Law of Municipal Corporations.

In all our towns there is a demand for the conveniences and appliances of modern improvement. All sorts of companies, for private profit, offer these conveniences to the public, and seek at the hands of the municipal authorities facilities for furnishing them. The use of the public streets is sought by water companies, gas companies, telegraph companies, telephone companies, street railway companies, and the like—generally without other compensation to the community which owns the streets than the indirect benefit to the people from the service offered.

Most of the members of municipal councils are business men, keenly alive to the time and labor-saving value of such enterprises, and it is a common thing for councils, even of large cities, to grant the applications of these companies for the use of the streets, without considering what responsibilities and obligations may thereafter grow out of such licenses.

In numerous cases all over the United States it has been held that where the municipal authorities have granted such licenses, and the grant has been acted upon by the doing of work and the expenditure of money, while the grant of the privilege is repealable by the council, yet such repeal will give rise to an obligation to make compensation for the loss so inflicted. In this class of cases, while it is held that the council cannot thus restrict its legislative powers, so as to disable it from doing what the public interest may afterwards appear to require, yet it would be inequitable that, when in good faith money had been ex-

pended on the faith of a legislative act, of which there was no room to anticipate the repeal, fair compensation should not be made.

Other authorities tend to indicate that persons acting on the privilege so granted, must take notice of its inherently revocable character, and therefore, if in the exercise of a legislative authority of which the council has no power to divest itself, the license is repealed, the consequences to the licensee are *damnum absque injuria;* and he is entitled to no compensation.

And yet another line of cases is found, in which slight or strong grounds are laid hold of, to construe such licenses into *contracts*, by which the city is irrevocably bound, under the constitutional inhibition, against the impairing of contracts.

In this state of things, a matter which is very often overlooked by our councils assumes a high degree of importance; namely, the expediency of inserting in every such grant of the privilege of using the streets a provision, that whenever in the discretion of the council the revocation of such grant, in whole or in part, shall appear to be required by the public interest, such revocation may be made without subjecting the city to any claim for compensation or damages. The licensee can be adequately protected against a corrupt or willful use of such reserved authority by making its exercise dependent on a decided majority—say two-thirds, or three-fourths—of all the members elected to the council.

The importance of this subject has recently received an emphatic illustration in the city of Baltimore.

In April, 1891, the council passed an elaborate ordinance allowing a street railway company to put a double track in a certain part of Lexington street. Some time after the passage of this ordinance (known as No. 23) it became apparent to the Mayor and City Engineer that the privilege was most unwisely granted, for a number of reasons; among which were, that Lexington street at that part of its course was a most important artery of travel and traffic, and that with a double track in it, giving the street cars space to pass safely, there would not be room on either side for vehicles to pass in safety. Accordingly, and before any work was done on that part of the line, notice was given to the company, by the Mayor, that at the earliest opportunity he should advise the councils to repeal so much of ordinance No. 23 as gave permission for a *double* track at the place indicated. This notice was followed by a conference between the Mayor and the officers of the street railway company, in which the grounds of

the Mayor's action were fully pointed out, and an opinion of the City Solicitor, holding that the city had the right to repeal and modify ordinance No. 23, was laid before them. Immediately after this conference the railway company proceeded in great haste, working night and day, to put in the obnoxious double track in that part of Lexington street. The council, on receiving the Mayor's message, repealed and modified ordinance No. 23, restricting the company to a single track at that part of Lexington street; and the company refusing to obey, the city proceeded itself to take steps to take up one of said tracks. The company filed its bill in the State Court for an injunction to restrain the city from molesting said tracks; the case was heard and decided in the city's favor. From this the company appealed, and, on a hearing, and application for a rehearing, the Court of Appeals of Maryland unanimously affirmed the decision dismissing the bill.

Lake Roland Elevated R'y Co. v. Mayor &c. of Baltimore, 77 Md. 352. [26 Atlantic Rep. 510.] March 16, 1893.

The opinion of the Court of Appeals is an elaborate and able one; well fortified by reasoning and authority. But the street railway company, like the hedgehog in the fable, had got in, and intended if possible to stay.

The Baltimore Trust and Guarantee Company filed a bill in the Circuit Court of the United States for the Maryland District, setting out that it was trustee in a mortgage by that railroad company to secure certain bonds; that the mortgage was made while ordinance No. 23 was unrepealed, and (in substance) that the double track in Lexington street was a material element of value to the security; that the road had been constructed and money spent on the faith of ordinance No. 23; and thereby it became a contract, protected by the Constitution of the United States, and asking that the city be enjoined. This case came on to be heard in the United States Circuit Court in November, 1894, before Goff, Circuit Judge, and Morris, District Judge. It is reported in 64 Federal Rep. 153. The Judges differed. Morris in a dissenting opinion refers to, and fully concurs in the opinion of the Court of Appeals of Maryland. Goff, Circuit Judge (whose opinion prevails when the Circuit and District Judges sitting together differ), in a somewhat elaborate opinion, holds that the license, acted on, constituted a contract; that it was not a mere *privilege* granted, but involved various conditions and duties to the public, which furnished a valuable consideration. He granted the injunction which the State Supreme Court had held ought not to be granted, and made it perpetual. The

controversy is interesting. It strikingly illustrates the propriety of cities and towns taking the precaution, *on the face of the grant,* to reserve the right to repeal and retract these privileges.

It also furnishes another instance of the rapidity with which the Federal Courts, on one ground or another, are eating away the autonomy of the States.

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THE DEEDS OF TRUST PUZZLE: A LEGAL PARADOX.

Some years ago a question was mooted in the *Virginia Law Journal** as to the priority of liens on a fund, where the recording or non-recording of a deed, or the docketing or non-docketing of a judgment, made a singular conflict; which resulted in what might be called a legal paradox. My attention was called to it at that time, and subsequently; and my conclusions were in accord with those of a very learned and able lawyer, Col. Edmund Pendleton, who based his opinion on a decision of Chief Justice Beasley in *Hoag v. Sayre,* 6 Stewart's (N. J.) Reports (33 N. J. Eq.), 552, decided in 1881.

It seemed to me the confusion arose from a lack of precision in the views taken as to the status of the conflicting claimants under the registry laws as to deeds and judgments.

At the request of a friend, I venture to offer my thoughts on this legal puzzle.

The doctrine of notice, and the effect of the recording acts as to deeds and of the docketing acts as to judgments, enter into the solution of the problem.

Equity has always protected its peculiar rights and titles, called "equities," by holding that the purchaser of a *legal* title, with notice of an equity, takes subject to that equity; and that a judgment lien on land is subject to an equity attaching to the judgment debtor in respect to such land.

But the cases now proposed to be considered are cases where *legal* titles are by the recording and docketing acts made void as to purchasers for value without notice, and as to all creditors. As to such legal titles, except under said acts, notice is immaterial; and the subsequent

* See 5 Va. L. J. (Aug. 1881), 528; 12 Va. L. J. 360; 424; 487.